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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

Nos. 452

CHARLES GOLDSTEIN,

Petitioner,

v.

MEGERDICH DABANIAN and EMMA K. DABANIAN t/a EAST TIOGA CHECK SERVICE,

Respondents.

LOUIS SERNOVITZ and SIDNEY SINGER,

Petitioners,

v.

IRVING HERTZ t/a TERMINAL CHECK SERVICE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OSCAR SPIVACK,
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Respondents submit this Brief in opposition to the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in the above entitled case.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

Whether an employee of a neighborhood check cashing establishment, where the business transactions conducted at that establishment consist of cashing checks, selling money orders and accepting payment of personal utility bills for a cash fee for local non-business residents, is entitled to receive the overtime benefits of the Fair Labor Standards Act.

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court, Eastern District of Pennsylvania, J. Cullen Ganey, Ch. J., are not officially reported but do appear at 41 Labor Cases ¶ 31,048.

The opinion of the Court of Appeals for the Third Circuit is reported at 291 F. 2d 208.

STATUTES AND REGULATIONS INVOLVED.

The statutes that are pertinent to this case are the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Act of 1949, c. 736, 63 Stat. 910 (29 U. S. C. Section 201 et seq.). Section 7(a) of the Act, 29 U. S. C. Section 207(a) applies the overtime provisions to an employee "who is engaged in commerce or in the production of goods for commerce." The retail exemption provision which applies to this case is Section 13(a)(2) of the Act, 29 U. S. C. Section 213(a)(2), as set forth in the Petition at page 2. The administrative employee exemption is contained in Section 13(a)(1) of the Act, 29 U. S. C. Section 213(a)(1). The pertinent regulations involved are contained in Part 779, Interpretative Bulletin of the General Coverage of the Wage and Hours Provisions of the Fair Labor Standards Act of 1938, 29 C. F. R. Section 779.

STATEMENT.

Respondents are the owners and operators of "check cashing" establishments patronized by non-business members of the general public who cash payroll and other checks, purchase money orders, and pay personal local utility bills.

The Petitioners, employed as managers of separate business establishments owned by the Respondents, allege that they were underpaid the statutorily interpreted hourly rate for time in excess of forty (40) hours per week. The factual situations in each action are similar, and they were consolidated for purposes of trial and appeal.

The Respondents moved to dismiss these actions on the grounds of: (1) the Petitioners are not engaged in interstate commerce or in the production of goods in interstate commerce; (2) the Petitioners are employed in a bona fide administrative capacity; and (3) the Petitioners are employed by a retail service establishment.

The District Court, upon stipulation, affidavits, depositions, and interrogatories made findings of fact and conclusions of law. It sustained the Respondents' position that the employees are not engaged in interstate commerce or in the production of goods for commerce. The Court made no conclusions of law on the question of exemptions.

The Court of Appeals held that (1) the Petitioners fell within the general coverage of the act, (2) they were not administrative employees, but (3) the Respondents conducted a retail service establishment so that the exemption precluded a recovery. The Petitioners requested a rehearing, and this was denied by the Court of Appeals on June 29, 1961.

The Respondents' business establishments are located in Pennsylvania, and all duties performed by the Petitioners are in this state. The cashing of checks, the issuance of money orders, and the acceptance of utility bill payments are performed for members of the general public

for their personal needs. None of the Respondents' customers is a commercial, business or industrial firm. All transactions are on a cash basis; no credit or loans is involved. The customer pays a cash fee for receiving cash for his check, a money order for his cash, or payment to a utility to satisfy his bill. Money orders are not sold on a wholesale or quantity basis. Utility bill payments are accepted at the behest of the customer and not the utility. Over 80% of the cash fees received by Respondents is derived from the cashing of checks. Fees are at the same rate to all customers, and no discounts are given for the quantity of checks cashed. No checks are accepted on a collection basis. The method of conducting these services is through a small outlet located in lower income neighborhoods It caters to individual wage earners and not business customers. Patrons are primarily people who live or work in the neighborhood or who are passing by.

The Court of Appeals analogized these activities to recognized retail services rather than banks or personal loan companies.

REASONS FOR DENYING THE WRIT.

The Petitioners assert that the decision of the Court below is in conflict with *Mitchell v. Kentucky Finance Co.*, 359 U. S. 290 (1959). The factual framework of that case, however, bears no similarity to the facts of the present controversy.

The Kentucky Finance Co. was engaged in the business of making personal loans and of purchasing conditional sales contracts from dealers. The House and Senate Reports on the 1949 Amendment pertaining to the retail service exemption clearly proscribed such credit companies from this exemption. Thus, any business engaged in "retail financing" cannot invoke the benefits of the retail exemption. The Court below correctly distinguished the *Kentucky Finance Co.* case when it pointed out that in the instant case, there is no dealing in finance, personal loans, or extension

of credit. The sale of the services herein involved is purely a retail service within the meaning of the exemption.

The Petitioners now contend, for the first time, that there is a need for additional proof to establish compliance with the percentage requirements of Section 13(a)(2) of the Fair Labor Standards Act. Both the District Court and the Court of Appeals decided this case upon stipulation of counsel, affidavits, interrogatories and depositions. In an Interim Opinion filed by the District Court, further information on utility bill payments and money order sales was requested by hearing, stipulation, or supplemental affidavits. One of the early questions emanating from the bench at the argument before the Court of Appeals inquired as to the need for this case being sent back to the lower court for further evidence. Counsel for the Petitioners and the Department of Labor agreed that the record was complete and ripe for judicial decision. After such agreement, the Petitioners cannot now assert that they are unsatisfied with the record. The failure of Petitioners to file affidavits containing facts contrary to those stated by Respondents indicates that such facts do not exist. In any event, such failure certainly cannot nullify the affidavits and other factual data submitted in support of Respondents' motion to dismiss.

Two of the Respondents' affidavits were taken by persons not parties to this case. Both are familiar with and engaged in the check cashing and sale of money order service industry. Both affidavits, which represent unrefuted testimony in this case, clearly indicate that the services sold by the Respondents are recognized as retail sales or services in the industry. These uncontradicted statements amply sustain the burden of demonstrating that the services are retail: *Boisseau v. Mitchell*, 218 F. 2d 734 (5th Cir. 1955); *Mitchell v. Krout*, 150 F. Supp. 857 (D. C. N. D. Cal. 1957).

The Petitioners suggest that the decision of the Court below conflicts with the classification given to check cashing by the Budget Bureau. However, Part 779.8 of the Interpretative Bulletin concerning retail exemptions, 29 C. F. R.

Section 779.8, declares that the ultimate decision must consider well settled habits of the business and understanding of the purchaser as well as the seller. The classification given by a governmental organization is far from controlling, and often it must give way to the findings on the other factors that must be considered: *Boisseau v. Mitchell*, 218 F. 2d 734 (5th Cir. 1955). It must be noted that the services provided by Respondents are commonly available in a great variety of retail stores, such as pharmacies, grocery stores, and super markets.

When the customer receives cash for his check or a money order for his cash, there is nothing in this transaction that remotely suggests a resale of the item received by him. A sale in a small quantity or direct to the consumer as distinguished from a sale in a large quantity to one who intends to resell is the important distinction: *White Motor Co. v. Littleton*, 124 F. 2d 92, 94 (5th Cir. 1941). A sale is made for resale when the seller has reason to believe that the goods or services will be resold: 29 C. F. R. Section 779.15(b)(d). The consumer in the present case does not resell the service purchased. It is obvious that there is no intention for the consumer to sell the cash he receives. The construction of the word "resale" does not depend upon what the seller does with the payment he receives but upon what the purchaser intends to do with the goods or services purchased. And further, the checks received are merely deposited in Respondents' bank account and are not sold to the bank. If the Petitioners' request to look at what the Respondents do with the checks received is sustained, then every business that receives and deposits a check in a bank will be subject to the Fair Labor Standards Act.

It must be noted that this is the first time that the Petitioners raise the above argument; it is obviously grasping at straws in the wind.

A retail service establishment performs a function at the very end of the stream of distribution: 29 C. F. R. Section 779.9(d). The Respondents are in business to sell

services for cash, and all transactions are completed on the premises. There is no controversy of major importance now before the Court. A bank or loan company is not a check cashing agency, and the check cashing business does not remotely resemble banking or money lending. There being an obvious factual distinction between such business activities, legislative edicts and judicial pronouncement have in no way been disrupted by the decision of the Court below. That decision rests upon the total factual situation involved in this case; at no time does it reveal disagreement with the *Kentucky Finance Co.* decision.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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